

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

BANG-ORN M. WILSON,

No. CV- 13-127-JPH

Plaintiff,

ORDER GRANTING

VS.

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

SUMMARY JUDGMENT

Defendant.

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 11, 13. The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and the parties' briefs, the court grants defendant's motion for summary judgment, **ECF No. 13**.

JURISDICTION

Wilson applied for disability insurance benefits (DIB) on March 25, 2010. She alleged onset as of June 25, 2007 (Tr. 163-69). Benefits were denied initially (Tr. 104-06, 109-11) and on reconsideration (Tr. 107-08, 117-18). ALJ R.J. Payne held hearings July 7, 2011 and October 14, 2011 (Tr. 43-53, 56-99) and issued an unfavorable decision on November 3, 2011 (Tr. 12-26). The Appeals Council denied review January 29, 2013 (Tr. 1-6). The matter is now before the Court

1 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on
2 March 27, 2013. ECF No. 1.

2 STATEMENT OF FACTS

3 The facts have been presented in the administrative hearing transcript, the
4 ALJ's decision and the parties' briefs. They are only briefly summarized here and
as necessary to explain the court's decision.

5 Wilson was 41 years old at onset and 45 at the hearing. She attended school
6 in Thailand and has a sixth grade education. She has not earned a GED. She has
7 worked as a caregiver and chef. On June 25, 2007, Wilson was involved in a car
accident that caused immediate neck pain. She alleges disability based on
8 degenerative disc disease (DDD), and chronic pain in the neck, mid back, shoulder
9 and left middle finger. She testified she can stand 10-15 minutes, sit 10-20
minutes, walk slowly for a quarter of a mile and lift no more than ten pounds. She
10 experiences sleep problems due to pain and medication side effects (Tr. 25, 71-73,
11 75-81, 86-90, 93). On appeal Wilson alleges the ALJ should have found she is
12 more limited.

12 SEQUENTIAL EVALUATION PROCESS

13 The Social Security Act (the Act) defines disability as the "inability to
14 engage in any substantial gainful activity by reason of any medically determinable
15 physical or mental impairment which can be expected to result in death or which
16 has lasted or can be expected to last for a continuous period of not less than twelve
months." 42 U.S.C. §§ 423 (d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
17 plaintiff shall be determined to be under a disability only if any impairments are of
such severity that a plaintiff is not only unable to do previous work but cannot,
18 considering plaintiff's age, education and work experiences, engage in any other
19 substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423
(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both

1 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
2 (9th Cir. 2001).

3 The Commissioner has established a five-step sequential evaluation process
4 or determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
5 one determines if the person is engaged in substantial gainful activities. If so,
6 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
7 decision maker proceeds to step two, which determines whether plaintiff has a
8 medically severe impairment or combination of impairments. 20 C.F.R. §§
9 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If plaintiff does not have a severe impairment
10 or combination of impairments, the disability claim is denied.

11 If the impairment is severe, the evaluation proceeds to the third step, which
12 compares plaintiff's impairment with a number of listed impairments
13 acknowledged by the Commissioner to be so severe as to preclude substantial
14 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R.
15 §404 Subpt. P App. 1. If the impairment meets or equals one of the listed
16 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is
17 not one conclusively presumed to be disabling, the evaluation proceeds to the
18 fourth step, which determines whether the impairment prevents plaintiff from
19 performing work which was performed in the past. If a plaintiff is able to perform
previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§
404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual capacity
(RFC) is considered. If plaintiff cannot perform past relevant work, the fifth and
final step in the process determines whether plaintiff is able to perform other work
in the national economy in view of plaintiff's residual functional capacity, age,
education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

19 The initial burden of proof rests upon plaintiff to establish a *prima facie* case

1 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
 2 met once plaintiff establishes that a physical or mental impairment prevents the
 3 performance of previous work. The burden then shifts, at step five, to the
 4 Commissioner to show that (1) plaintiff can perform other substantial gainful
 5 activity and (2) a “significant number of jobs exist in the national economy” which
 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

6 **STANDARD OF REVIEW**

7 Congress has provided a limited scope of judicial review of a
 8 Commissioner’s decision. 42 U.S.C. § 405(g). A Court must uphold the
 9 Commissioner’s decision, made through an ALJ, when the determination is not
 based on legal error and is supported by substantial evidence. *See Jones v. Heckler*,
 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
 10 1999). “The [Commissioner’s] determination that a plaintiff is not disabled will be
 11 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*
Heckler, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial
 12 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
 13 1119 n. 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,
 14 888 F.2d 599, 601-02 (9th Cir. 1989). Substantial evidence “means such evidence
 as a reasonable mind might accept as adequate to support a conclusion.”
Richardson v. Perales, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch
 15 inferences and conclusions as the [Commissioner] may reasonably draw from the
 16 evidence” will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir.
 17 1965). On review, the Court considers the record as a whole, not just the evidence
 18 supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,
 19 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

It is the role of the trier of fact, not this Court, to resolve conflicts in

1 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
2 interpretation, the Court may not substitute its judgment for that of the
3 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
4 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
5 set aside if the proper legal standards were not applied in weighing the evidence
6 and making the decision. *Brawner v. Secretary of Health and Human Services*, 839
7 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
8 administrative findings, or if there is conflicting evidence that will support a
9 finding of either disability or nondisability, the finding of the Commissioner is
10 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

ALJ'S FINDINGS

11 ALJ Payne found Wilson was insured through December 31, 2012 (Tr. 12,
12 14). At step one, he found she did not work at SGA levels after onset on June 25,
13 2007 (Tr. 14). At steps two and three, the ALJ found she suffers from degenerative
14 disc disease and soft tissue sprains and strains of the cervical, thoracic and lumbar
15 spine, impairments that are severe but do not meet or medically equal a listed
16 impairment (Tr. 14-15). The ALJ found Wilson less than fully credible (Tr. 16). He
17 found she is able to perform a range of light work (Tr. 15-16). At step four, the
18 ALJ found Wilson is unable to perform any past relevant work (Tr. 25). At step
19 five, the ALJ relied on the Grids (Medical Vocational Guidelines) as a framework
and found Wilson was not disabled from onset through date of the decision,
November 3, 2011 (Tr. 25-26).

ISSUES

17 Wilson alleges the ALJ failed to properly weigh the medical evidence and
18 should have obtained a vocational expert's testimony at step five. ECF No. 11 at 2.
19 She also appears to challenge the ALJ's negative credibility determination. The
Commissioner responds that the ALJ applied the correct legal standards and the

1 decision is supported by substantial evidence. She asks the court to affirm. ECF
2 No. 13 at 1-2.

DISCUSSION

A. Credibility

4 Wilson alleges the ALJ failed to include pain when he determined her
5 residual functional capacity, meaning he erred when he found she is less than
6 credible. ECF No. 15 at 3-4, 8-9, 15-18. The Commissioner answers that the ALJ's
7 credibility determination is supported by clear and convincing evidence and free of
harmful error. ECF No. 17 at 9-11.

8 To aid in weighing the conflicting medical evidence, the ALJ evaluated
9 Wilson's credibility. Credibility determinations bear on evaluations of medical
evidence when an ALJ is presented with conflicting medical opinions or
inconsistency between a claimant's subjective complaints and diagnosed condition.
10 *See Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005). It is the province of the
11 ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039
12 (9th Cir. 1995). However, the ALJ's findings must be supported by specific cogent
13 reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
14 affirmative evidence of malingering, the ALJ's reason for rejecting the claimant's
testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th
Cir. 1995).

15 The ALJ's reasons are clear and convincing.

16 The ALJ relied in part on Wilson's activities and inconsistent statements
17 when he found her less than credible. After onset Wilson traveled to Thailand,
18 Boise and Montana. She spent a month in Texas, went fishing, and hiked for two
hours, all activities that are inconsistent with allegedly disabling limitations. (Tr.
19 22, 92-93, 548, 566, 913, 949, 1056, 1292, 1340, 1369). She failed to give
maximum or consistent effort during testing, showing improved strength when

1 unaware of the testing (Tr. 946). She stated she considered selling her restaurant
2 because her children were pursuing their own interests, she had hired two cooks
3 and she was unable to work in the kitchen; elsewhere she indicated disability
4 forced her to close her restaurant (*cf.* Tr. 564 *with* Tr. 632). She told a physical
5 therapist it is too painful to reach behind her to attach a bra and her husband has to
6 do it for her, but she was observed performing this task (Tr. 995). Wilson failed to
7 comply with treatment without explanation (Tr. 913, 915, 917, 919, 921, 923, 925,
8 1054, 1133, 1162) and exaggerated symptoms (Tr. 20, 22, 942, 946, 1055). These
9 reasons are clear, convincing and supported by the record. *Burch v. Barnhart*, 400
10 F.3d 676, 680 (9th Cir. 2005)(daily activities, lack of consistent treatment and lack
11 of objective medical findings are factors the ALJ may properly consider, as long as
12 lack of findings is not the sole basis); *Thomas v. Barnhart*, 278 F.3d 947, 958-59
13 (9th Cir. 2002)(proper factors include inconsistencies in claimant's statements,
14 inconsistencies between statements and conduct and failure to give maximum or
15 consistent effort); and *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)
16 (unexplained failure to comply with treatment diminishes credibility).

17 *B. Weighing opinion evidence*

18 Wilson alleges the ALJ erred when he weighed the medical evidence,
19 resulting in error at step two and in the RFC assessment. She alleges the ALJ
should have given more credit to the opinions of treating and examining sources
and less to reviewing and testifying doctors. ECF No. 11 at 4-18. The
Commissioner responds that the ALJ's reasons for failing to credit some of the
contradicted opinions, particularly of Dr. Emery, are specific, legitimate and
supported by substantial evidence. ECF No. 13 at 5-11.

20 Wilson alleges the ALJ should have found her arm/hand impairment severe
21 at step two. She describes this as parasthesias (numbness and tingling) and "right
22 wrist and right thumb impairments" ECF No. 11 at 4-6. The Commissioner

1 answers that any step two error is harmless in this case because Wilson fails to
2 show that finding a severe wrist impairment would alter the outcome of her claim.
3 ECF No. 13 at 14-16.

4 In support of the argument, Wilson first cites three 2007 medical records
5 (Tr. 379, 517, 679). In the first on July 6, 2007, treating doctor Mark Hoggan,
6 M.D., notes a positive Tinel's on the right wrist (Tr. 679). A few weeks later
7 evaluating neurologist J. Robert Clark, M.D., notes "parasthesias in the upper
8 extremity with question of bilateral CTS as a consequence of the strain in the wrist
9 and forearm." She has no symptoms which suggest radiculopathy in the arms or
10 legs (Tr. 379). In November 2007 a physical therapist notes decreased grip strength
11 in the left hand, as the ALJ observed (Tr. 21, 517). The ALJ points out that in
12 September 2007, examining doctor Kurt Anderson, M.D., found no provocative
13 signs for either cubital tunnel or carpal tunnel symptoms on either extremity, and
14 ordered a full neurological workup (Tr. 21, 413). The subsequent EMG was normal
15 (Tr. 416). On January 8, 2008, Tinel's was negative (Tr. 806). In June 2008 Wilson
16 reported her left wrist did not affect her activities of daily living (Tr. 21, 285).

17 Wilson then cites four 2008 records. ECF No. 11 at 5-6; Tr. 619-20, 806,
18 827, 857. The first, January 8, 2008 is by examiner Jennifer Ballard, ARNP
19 [Plaintiff mistakenly attributes it to Dr. Emery]. Ballard found Wilson
demonstrates bilateral thumb abductor strength weakness and "severe perceived
disability." Ballard observes two prior EMG/NCS tests in both upper extremities
were negative for any neurological abnormalities (Tr. 806). On April 8, 2008,
treating chiropractor Paul Alder, D.C., notes paraspinal studies that day showed
"malpositions and moderate pain in left wrist [and] moderate hypertonicity and
moderate pain of the right wrist" (Tr. 619-20). The ALJ was not required to credit
an opinion based on plaintiff's unreliable self-reporting. *Bayliss v. Barnhart*, 427
F.3d 1211, 1216 (9th Cir. 2005). On July 29, 2008, treating Dr. Long noted that,

1 after injecting a thoracic facet joint block, Wilson “still has mid back pain as well
2 as numbness in both hands and all [of her fingers]” (Tr. 827). This note appears to
3 be based on her self-report. November 19, 2008, treating Dr. Steven Goodman,
4 M.D., [mistakenly attributed to Dr. Emery] diagnosed right forearm and wrist
strain (Tr. 857).

5 Next, Wilson cites a 2009 note by Dr. Dibble, who “assessed right carpal
6 tunnel symptoms.” ECF No. 11 at 6, referring to Tr. 1103. The ALJ was not
7 required to credit unreliable self-reported symptoms. Wilson then cites the ME’s
8 testimony that “Plaintiff exhibited inflammation in the right thumb, narrowing of
9 the deep core veins in the right thumb, and tendinitis of the base of the thumb area,
10 but did not assess any right hand limitations.” ECF No. 11 at 6, citing Tr. 63, 65.
11 Wilson seems to imply that if one has a condition it must cause limitations, but that
12 was not what the ME found. Last, she cites treating Dr. Emery’s 2011 opinion that
13 Wilson has grasping and fine manipulation limitations in both hands. ECF No. 11
14 at 6, citing Tr. 1459.

15 The ALJ rejected some of Dr. Emery’s contradicted opinions for specific
16 and legitimate reasons supported by substantial evidence. The ALJ notes Dr.
17 Emery’s 2011 RFC for less than sedentary work is not corroborated by Emery’s
18 own minimal findings, nor by the minimal findings of other providers (Tr. 24). As
19 an example the ALJ notes physical therapy substantially improved Wilson’s strains
in a short period of time. In September 2007 a physical therapist reported cervical
spine range of motion was 90% of normal for rotation and flexion and 25% limited
in extension. By November 2007, Wilson reported parasthesias in the upper
extremities had resolved (Tr. 19, 511).

20 The ALJ specifically credited the opinions of treating doctor Mark Hoggan,
21 M.D., and Captain Glenn Little, PA, at Fairchild Airforce Base. They consistently
22 released Wilson without any restrictions (Tr. 24, 669, 672-73, 680, 683) and noted

1 “good exercise habits” (Tr. 677). This is consistent with Wilson’s report on April
 2 21, 2010 that she walks on a treadmill for exercise (Tr. 241).

3 Dr. Emery’s 2011 RFC assesses extreme limitations. Standing is limited to
 4 five minutes, sitting to ten minutes (Tr. 1457). The ALJ notes the RFC for less than
 5 sedentary work is contradicted by Dr. Emery’s own records (Tr. 24). Immediately
 6 after the car accident Dr. Emery limited Wilson to light duty work with no heavy
 7 lifting. Thereafter, he consistently opined she was capable of this level of work,
 8 with the exception of suggesting she should be off work for two months in January
 9 2008. Dr. Emery notes range of motion limitations were due to pain. No clinical
 10 findings corroborate the limited range of motion. In June 2009, Dr. Emery
 11 encouraged Wilson to get aerobic exercise four to five days a week, as tolerated
 12 (Tr. 24, 565, 567, 569, 1067). The ALJ properly rejected this opinion because it is
 13 contradicted by most of the medical evidence, inconsistent with Wilson’s reported
 14 activities, inconsistent with Emery’s other records and inadequately supported by
 15 clinical findings. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 99th Cir. 2005).

16 The ALJ properly found Wilson’s right wrist and thumb impairments, and
 17 parasthesias, are not severe.

18 *C. New evidence accepted by the Appeals Council*

19 Kathleen Meyer, M.D., saw Wilson October 27, 2011, more than three
 20 months after the hearing and shortly before the ALJ’s November 3, 2011 decision
 21 (Tr. 1475). She complained, in part, of occasional right wrist pain. After reviewing
 22 a September MRI and examining Wilson, Dr. Meyer offered treatment options of
 23 surgery at the C5/6 level or nerve block injections. Wilson opted for the injection
 24 (Tr. 1476).

25 The ALJ accepts the new evidence as part of the record, but finds that Dr.
 26 Meyer’s report and the September 2011 MRI do not change the result. Plaintiff
 27 retains the remedy of filing a new application.

1 *D. RFC assessment*

2 In the residual functional capacity assessment, the ALJ included the ability
 3 to frequently reach in all directions above shoulder height with the right arm, and
 4 to frequently kneel and crawl (Tr. 15). Wilson alleges the ALJ relied on the
 5 testifying expert and a reviewing agency consultant in reaching this determination.
 6 She alleges this was error, because if the ALJ had properly given more credit to
 7 treating and examining sources, he would have found she is more physically
 8 limited. This simply recasts the allegation that the ALJ erred when he weighed the
 9 evidence.

10 The ALJ's reasons for rejecting more dire limitations are specific, legitimate
 11 and supported by substantial evidence.

12 *E. Step five*

13 Wilson alleges the ALJ erred at step five by relying on the Grids as a
 14 framework instead of a vocational expert, despite the presence of significant
 15 nonexertional limitations. ECF No. 11 at 18-20. The Commissioner answers that
 16 there was no error because the assessed non-exertional limitations did not
 17 significantly erode the occupational base. ECF No. 13 at 11-14.

18 The Commissioner is correct. The ALJ's limitations of occasional balancing,
 19 stooping and crouching, as well as frequent kneeling and crawling do not
 1 substantially affect sedentary and light levels of work. SSR 83-14. Nor does the
 2 need to avoid concentrated exposure to vibration and hazards. SSR-15. The ALJ
 3 was not required to obtain a VE's testimony in this case.

4 **CONCLUSION**

5 After review the Court finds the ALJ's decision is supported by substantial
 6 evidence and free of harmful legal error.

7 **IT IS ORDERED:**

8 1. Defendant's motion for summary judgment, ECF No. 13, is granted.

1 2. Plaintiff's motion for summary judgment, ECF No. 11, is denied.
2 The District Executive is directed to file this Order, provide copies to
counsel, enter judgment in favor of defendant, and **CLOSE** the file.
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4 DATED this 28th day of March, 2014.
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s/James P. Hutton

JAMES P. HUTTON

UNITED STATES MAGISTRATE JUDGE